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Supreme Court of the United States

October Term, 1936.

JOSE MATOS, PETITIONER,

vs.

ALONSO HERMANOS, *et al.*, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jose Matos, respectfully shows:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment made and entered in said Circuit Court of Appeals on February 12, 1936 (Circuit Judge BINGHAM dissenting), by which a judgment of the Supreme Court of Puerto Rico dismissing the bill of complaint was reversed, as to which judgment the Circuit Court of Appeals entertained a motion for rehearing and denied the same on April 30, 1936 (Tr. p. 71).

By order of the Circuit Court of Appeals, the issuance of the mandate was stayed on May 18, 1936 to afford petitioner an opportunity to apply to this Court for a writ of certiorari (Tr. p. 71).

I.

Statement of the Matter Involved.

This matter involves the interpretation of certain provisions of the Civil Code of Puerto Rico, originally taken from the Civil Code of Spain, and their application to a sale of a herd of cattle of which a portion were found some time after delivery to be suffering from tuberculosis. The Circuit Court of Appeals by a majority vote reversed the judgment of the Supreme Court of Puerto Rico, reversing the interpretation given by the Supreme Court of Puerto Rico to such statutes of Spanish origin and their application to the facts in this case (Tr. p. 53). Circuit Judge BINGHAM dissented and voted for affirmance (Tr. p. 60).

On March 1, 1929 petitioner sold and delivered to respondents a herd of cattle consisting of 122 head "of different nature, race, gender, ages and color for the lump sum of $18,000" (Tr. p. 2).

On March 18th, three of the cattle died. Respondents brought this suit before the District Court for the Judicial District of San Juan, Puerto Rico on December 12, 1929 (Tr. p. 1). At the time of filing suit 43 of the cattle had died of tuberculosis and 29 more had been killed by the Department of Health. The remaining 50 animals were sound and not infected (Opinion Trial Court, Tr. p. 19, *et seq.*)

The Trial Court found that some of the herd had tuberculosis at the time of the sale but made no finding

as to the number then suffering from the disease. It is admitted that petitioner acted in good faith and sold the cattle without knowledge that they were diseased.

Upon these facts respondents contend that the entire contract of sale was void and inexistent under Section 1397 of the Revised Civil Code of Puerto Rico, which provides that "animals and cattle suffering from contagious diseases shall not be the object of a contract of sale." Respondents contend that because some of the animals were suffering from tuberculosis, there was a total lack of consideration, that there was no contract between the parties, and seek to recover the entire purchase price.

Petitioner contends that the provisions of Section 1397 give rise only to a redhibitory action, an action in the nature of equitable rescission, and that respondents' remedies were a suit for damages for breach of warranty, or a redhibitory action for a partial rescission of the contract. Petitioner maintains that the 50 sound cattle were sufficient consideration to support the contract, that a contract did exist to which a warranty could attach, and that such contract cannot be considered inexistent.

It is admitted that any action for damages for breach of warranty or for the redhibition (rescission) of the contract had prescribed prior to the bringing of the action. Both by demurrer and by answer, petitioner pleaded prescription.

The Trial Court held that the entire contract was without consideration and inexistent and that there being no contract, respondents were entitled to re-

cover the entire purchase price, but that respondents should return to petitioner the 50 sound animals (Tr. p. 19, *et seq.*)

Upon appeal, the Supreme Court held by a unanimous decision that a breach of Section 1397 of the Revised Civil Code gave rise only to a redhibitory action, an action to rescind the contract, and that such action was barred prior to the bringing of the suit. The Supreme Court held that the demurrer for prescription should have been sustained, reversed the judgment of the District Court, and ordered the complaint dismissed (Tr. p. 25, *et seq.*) The Supreme Court denied a motion for reconsideration.

Upon appeal, the Circuit Court of Appeals by a majority vote reversed the Supreme Court of Puerto Rico and ordered the case remanded with instructions to permit respondents to amend their complaint in the Trial Court in such a way as to seek recovery only of the price of the 72 cattle which had died. The majority opinion held that the contract of sale might be divided and considered as two separate contracts, one covering the sound cattle and one covering the diseased cattle, or into 122 separate contracts, each for one cow. They held that as to such contract or contracts covering only the diseased cattle, there was a total lack of consideration under Section 1397 and that an action would lie to recover the price upon the theory that the contract was inexistent (Tr. p. 53, *et seq.*).

Circuit Court Judge BINGHAM dissented and in a dissenting opinion (Tr. p. 60, *et seq.*) held that there was only one contract and that it could not be divided

up and treated as separate contracts. He held that there was sufficient consideration to support the contract, that the contract was existent, and that respondents' cause of action was either for damages for breach of warranty or a redhibitory action for rescission, both of which had prescribed.

II.

Reasons Relied Upon for the Allowance of the Writ.

Petitioner respectfully submits that the decision of the Circuit Court of Appeals should be reviewed and the writ of certiorari issued for the following reasons:

(a) Because the prevailing opinion of the Circuit Court of Appeals has reversed the decision of the Supreme Court of Puerto Rico upon matters relating wholly to the construction and application of local statutes of Spanish origin, which construction and application were not clearly wrong.

(b) Because the prevailing opinion of the Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions.

The decision that a sale of diseased animals is inexistent under Section 1397 of the Revised Civil Code, rather than that such defect constitutes a redhibitory vice, is in conflict with the decision of the Supreme Court of Puerto Rico and of the Spanish authorities

locally applicable, as is the decision that a contract for the sale of a herd of animals of different nature, race, gender, ages and color, for a lump sum, is divisible and may be made an inexistent contract in part and a valid contract in part.

(c) Because the prevailing opinion of the Circuit Court of Appeals has decided important questions of general law in a way probably untenable and in conflict with the weight of authority.

The decision that the contract may be divided into a valid existing contract and an inexistent contract, the decision that the respondents are entitled to amend their complaint to state a cause of action on implied contract when they had an adequate remedy upon the express contract, and the decision that the respondents are entitled to amend their complaint to state a new and entirely different cause of action from that stated in the original complaint after the statute has run against such new cause of action, are all decisions upon important questions of general law and such decisions are untenable and in conflict with the weight of authority.

WHEREFORE, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the First Circuit, to certify and send to this Court a full and complete transcript of the record herein to the end that the said case may be reviewed and determined by this Court as provided by law, and that the decision of the Circuit Court

of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

JOSE MATOS,
By GABRIEL I. LEWIS,
His Attorney.

OSCAR B. FRAZER,
Of Counsel for Petitioner.

We hereby certify that we have examined the foregoing petition; that in our opinion the petition is well founded and entitled to favorable consideration by the Court and that it is not filed for the purpose of delay.

GABRIEL I. LEWIS,
OSCAR B. FRAZER,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1936.

JOSE MATOS, PETITIONER,

against

ALONSO HERMANOS, *et al.*, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

The facts are fully set forth in the petition for the writ of certiorari to which reference is hereby made.

Opinions of the Courts Below.

The opinions of the Circuit Court of Appeals are reported as "Hermanos v. Matos" at 81 Fed. (2nd) 930. The majority opinion appears at page 53 and the dissenting opinion at page 60 of the transcript. The original opinion of the Supreme Court of Puerto Rico is printed at page 46 D. P. R. 470, and the opinion denying reconsideration at 46 D. P. R. 909 (Spanish edition). Neither opinion is as yet published in the English edition. The original opinion of the Supreme Court is printed at page 25 of the transcript. The

opinion denying reconsideration is not printed, the Circuit Court of Appeals having ordered that it be omitted (Tr. 52). The opinion of the Trial Court is not published but appears at page 19 of the transcript.

Jurisdiction of this Court.

The judgment to be reviewed was rendered on February 12, 1936 (Tr. p. 68), while the Circuit Court of Appeals entertained a petition for re-hearing (Tr. 68) and denied the same on April 30, 1936 (Tr. 71). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (Chap. 229, 43 Statutes 936; Title 28 U. S. C. A. Section 347).

Specification of Errors.

Petitioner respectfully submits that the Circuit Court of Appeals in reversing the judgment of the Supreme Court of Puerto Rico, has erred:

1. In failing to follow the rule established by this Honorable Court that in matters which relate entirely to the construction or application of local statutes, especially those of Spanish origin, the decisions of the Supreme Court of Puerto Rico will not be disturbed or set aside unless they are clearly wrong.

2. In reversing the decision of the Supreme Court of Puerto Rico that plaintiff's right of action was redhibitory and was barred by prescription.

3. In holding that the contract of sale herein was divisible into two or more contracts, and in so interpreting the decision of the Supreme Court of Puerto Rico.

4. In permitting the amendment of the complaint to state a cause of action upon an implied contract for money had and received, when respondents had a remedy upon the express contract for breach of warranty, which had prescribed prior to suit.

5. In permitting the amendment of the complaint to set up an entirely new and different cause of action from that alleged in the original complaint after such new cause of action had been barred by prescription.

Summary of Argument.

1. Respondents' right of action was for rescission (redhibition), which had prescribed.

2. The contract is not divisible.

3. The Circuit Court of Appeals erred in permitting respondents to amend their complaint to state a cause of action on an implied contract;

(a) Because respondents had an adequate remedy on the express contract; and

(b) Because the amendment would state a new cause of action already barred.

4. The Court erred in reversing the Supreme Court on matters of Spanish law.

5. The result reached is not just.

POINT I.

Pulmonary tuberculosis in an animal constitutes a redhibitory vice, which is a breach of warranty and gives rise to an action for rescission of the contract, or at the vendee's option, an action for damages for breach of warranty, both of which actions had prescribed when this suit was brought.

The complaint proceeds upon the theory, and respondents so contend, that the contract of sale was wholly inexistent,—that no contract at all was entered into between the parties,—that the contract was a nullity in toto, and that they are entitled to recover the entire purchase price of the 122 cattle because of the fact that a portion of the cattle were suffering from pulmonary tuberculosis at the time of the sale, and notwithstanding that upon the trial it was admitted and found that 50 head were sound and well. They base this contention upon the following section of the Revised Civil Code of Puerto Rico:

> "Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.
>
> A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

Respondents would disregard entirely the sections of the Code surrounding Section 1397 and consider this

section by itself, maintaining that because of this section this case is governed by the following sections of the Revised Civil Code.

> "Section 1228.—There is no contract unless the following requisites exist:
>
> 1.—The consent of the parties.
>
> 2.—A definite object which may be the subject of the contract.
>
> 3.—The cause (consideration) for the obligation which may be established.
>
> Section 1238.—All things, even future ones, which are not out of the commerce of man, may be objects of contracts."

Respondents maintain that since under Section 1397 cattle suffering from a contagious disease could not be the subject of a contract of sale, there was "no definite object which may be the subject of the contract" and likewise no "cause (consideration) for the obligation".

Petitioner contends, and the Supreme Court of Puerto Rico so held, that it is clear from the context of Section 1397 and its position in the Civil Code, the history of the section itself, and from the opinions of the Spanish commentators, that pulmonary tuberculosis in cattle, like any other hidden defect in an animal or thing sold, is a breach of warranty and gives rise to an action for damages for breach of warranty or an action to rescind the contract in whole or in part, as the case may be, for such breach of warranty. Petitioner contends, and the Supreme Court so held, that notwithstanding the breach of warranty there was an

existing contract between the parties which cannot be adjudged to be an inexistent contract under Section 1228, and that the true meaning of Section 1397 is that the contract is not void but voidable.

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this point, but far from being clearly wrong the decision of the Supreme Court is clearly right on principle and is supported by the overwhelming weight of authority.

Section 1397 is not placed in that chapter of the Civil Code which treats of "Nullity of Contracts" (Chapter VI of Title II of Book 4th), but in Title IV which treats of "Contracts of Purchase and Sale" in a subdivision entitled "Warranty against hidden defects of or burdens on the thing sold". This subdivision comprises 16 sections of the Code, all dealing with the warranty against hidden defects. For the convenience of the Court we are printing the entire subdivision as Appendix "A" to this brief.

Sections 1387 and 1388 make the vendor liable for hidden but not for patent defects; Section 1389 gives the vendee an option to withdraw from the contract or demand a proportional reduction of the price; Sections 1390 and 1391 refer to a loss of the thing sold; Section 1392 refers to warranties in judicial sales, and Section 1393 provides a six months' Statute of Limitations on actions based on the preceding sections. Section 1394 is peculiarly applicable to the present case. It provides:

> "Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the red-

hibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.

This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same."

Section 1395 makes the provisions of the preceding section applicable to things other than animals. Section 1396 provides:

> "Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, *except in the case prescribed in the following section.*" (Italics ours.)

Then follows Section 1397 (*supra*), upon which respondents rely. Section 1398 provides that if the hidden vice is such that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory, but if the veterinarian by negligence or bad faith fails to discover it, the veterinarian shall be liable. Section 1399 then provides the Statute of Limitations which the Supreme Court held to bar the present action, as follows:

> "Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established."

Section 1400 treats of the death of an animal within three days after delivery. Section 1401 requires the return of the animals sold if the sale be rescinded, and Section 1402 gives to the vendee of animals suffering with redhibitory vices, the option to withdraw from the contract or demand a proportional reduction in the price.

This whole chapter or subdivision was copied from the Spanish Civil Code of 1889, which was in force in Puerto Rico at the time of the change of sovereignty. We submit that clearly these sections were intended to constitute and do constitute a complete statute covering the matter of warranty against hidden defects and that all of its sections are parts of an integrated plan and must be read together. We submit, and the Supreme Court so held, that Section 1397 refers to a warranty against hidden defects just as much as do the other sections in the Chapter. The Legislature could never have intended to interpolate into this statute on warranties a section covering the inexistence of contracts which in itself would negative any idea of a warranty. If the contracts referred to in Section 1397 were inexistent, clearly there would be no warranty, as there would be no contract upon which to fasten the warranty, and yet this section appears as an integral part of this Statute covering warranties.

Upon the question of whether the contagious diseases referred to in Section 1397 constitute a redhibitory vice and a breach of warranty as maintained by petitioner, or whether they make the contract wholly inexistent and hence preclude the possibility of any

warranty, as contended by respondents and as held by the Circuit Court of Appeals, the concluding phrase of Section 1396 (italicized above) is peculiarly enlightening. This section provides that the warranties against hidden vices of animals shall not obtain in sales made at fairs, etc., "except in the case prescribed in the following section", and the following section is the disputed Section 1397 referring to contagious diseases. Unless the Legislature understood and intended that the contagious diseases referred to in Section 1397 were hidden vices, and a breach of warranty, the last clause of Section 1396 would be absolutely meaningless.

The history of this legislation shows conclusively that pulmonary tuberculosis in cattle was understood and intended by the Legislature to be a redhibitory vice and subject to the short Statute of Limitations contained in the present Section 1399 (*supra*). The Spanish Civil Code of 1889 (containing the sections in Appendix "A" but with different numbers) was taken largely from the Civil Code Bill or Project of 1851, which has been called the parent of the Code of 1889. Article 1460 of the Project of 1851 is practically the same as the first paragraph of Section 1397 of the present Revised Civil Code. It read:

> "The sale of cattle or other animals suffering from contagious diseases is prohibited, and any contract made with respect to the same shall be void."

This article appeared in the Project of 1851 in a chapter entitled "Warranty against hidden defects or encumbrances of the thing". The Project of 1851, how-

ever, went on to define what constituted redhibitory defects as follows:

> "1420. With respect to cattle, the following constitute redhibitory defects:
>
> 1. The condition resulting from the non-expulsion of the placenta and the reversion or fall of the uterus or vagina, provided that the parturition took place while the cow was in the possession of the vendor.
>
> 2. *Pulmonary tuberculosis.*
>
> 3. Epilepsy.
>
> 4. The vice of sucking cows (mamonas).
>
> 1421. In the case of subdivision one of the preceding article, the action must be brought within nine days. In the case of the other three subdivisions, within fifteen days."

The principle that a hidden vice in animals gives rise to a redhibitory action for a breach of warranty goes back in Roman law to the time of the Ediles (see Enciclopedia Juridica Espanola XXVI, 884, quoted at length in the Supreme Court opinion, Tr. p. 36) and appears today in the Codes of those countries following the Roman law. In Les Codes Francais, 12th Edition of Louis Tripier, 1861, p. 22, the author gives pulmonary tuberculosis as the first redhibitory defect in cattle. The Belgian Code contains similar provisions.

That pulmonary tuberculosis in cattle is a redhibitory vice, giving rise to an action for rescission, and that it does not cause the inexistence of the con-

tract is the overwhelming view of the Spanish commentators on Section 1494 of the Spanish Code which is identical with Section 1397 of the Puerto Rico Code. The opinion of the Supreme Court of Puerto Rico, at pages 31 to 37 of the transcript, contains quotations from many of these commentators which, for the sake of brevity, we are not repeating here but which leave no doubt upon the subject.

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this fundamental question of Spanish law largely through a mistaken application of certain sections of the Penal Code of Puerto Rico which are totally irrelevant. The majority opinion states (Tr. p. 55):

> "Other sections of the Code deal with the same subject matter, i. e., cattle infected with contagious diseases, and must be considered in this connection."

The Court then copies Sections 351, 352 and 356 of the Penal Code and a criminal statute of March 14, 1907, and continues:

> "These sections in connection with others which it is unnecessary to quote, taken together, form a plan of dealing with the menace to public health occasioned by diseased animals. Section 1397 is obviously an integral part of this plan and should be so considered. The Supreme Court of Puerto Rico does not seem to have had this aspect of the matter in mind. It is not referred to in the opinion, nor are the sections just quoted referred to. * * * But we see no escape from the conclusion that the Supreme

> Court of Puerto Rico overlooked important provisions of law and erred in disregarding the plain language of Section 1397."

The Circuit Court of Appeals states and apparently understood that the sections of the Penal Code which it quotes were a part of the Civil Code, with which, of course, the Penal Code has no relationship. The Civil Code, of which Section 1397 forms a part, is a Spanish statute founded upon Roman law, and the principles set forth in the chapter on warranties go back many centuries, while the Penal Code is a statute of American origin adopted in Puerto Rico for the first time after the American occupation and having no connection with any Spanish or Roman law. Obviously, the sections of the Penal Code copied in the opinion which were taken from the criminal law of one of the American States can have no connection with the provisions of the Civil Code of Spain as to warranties, which antedated the criminal statute by many years. To hold that these sections of the Penal Code and Section 1397 of the Civil Code are integral parts of a coordinated plan was clearly erroneous.

Nor did the Supreme Court of Puerto Rico overlook these sections of the Penal Code. In denying the respondents' motion for reconsideration, the Supreme Court said (translating from 46 D. P. R. 910):

> "The proponents of the motion now draw our attention to the provisions of the law making a vendor of diseased animals subject to a criminal prosecution. The answer to this suggestion is that the law only covers the sale of animals knowing them to be contaminated with

> a contagious disease. The Puerto Rican Legislature thought that such an act was criminal and so declared, but the fact that it is declared to be criminal does not necessarily affect the rights between parties, especially where there is no bad faith. The idea of the Spanish Legislature, and it is our own, was *Interest Reipublicae ut sit finis litium.*"

We submit that under the overwhelming weight of authority on this question of Spanish law, respondents' remedy was to sue under Section 1394 for a partial rescission of the contract and that such right of action had prescribed under Section 1399 and that the complaint was properly dismissed by the Supreme Court.

POINT II.

The Circuit Court of Appeals erred in holding that the contract could be divided and that as to the cattle suffering from tuberculosis, the contract was inexistent.

Clearly the contract was not inexistent under Section 1228 (*supra*) for lack of a licit object or consideration. At most there was a partial lack or partial failure of consideration and the 50 cattle which were admittedly sound and well were sufficient consideration to support the contract.

The prevailing opinion of the Circuit Court of Appeals admits this and holds that if the contract be considered as a single contract, then the action must

fail and the judgment of the Supreme Court be affirmed. The Court says (Tr. p. 58):

> "If the herd of cattle which were sold be regarded as a unit and as the thing which was sold, a different result would be reached because about fifty of the cattle were sound and were legitimate objects of sale. The thing sold was not therefore completely unlawful as an object of commerce; the good portion of it would pass to the vendee and would have to be returned by him if he elected to rescind; the action would be redhibitory in character and would be limited by the provisions of section 1399."

The majority of the court then proceeded by an attempted legal fiction to create two contracts between the parties, one contract covering the sound cattle, which the Court held to be a valid and existing contract, and another and wholly different contract covering the diseased cattle, which the Court then proceeded to declare inexistent upon its theory that tuberculosis causes the inexistence of a contract and not the right to rescind. Having reached this conclusion, the Court remands the case with instructions to permit the plaintiffs to amend their complaint in the Trial Court in such a way as to make the action an action for money had and received based upon the inexistence of this fictitious contract for the sale of the diseased cattle.

In reaching this conclusion, the majority of the Court purported to follow a holding by the Supreme Court of Puerto Rico in its opinion, *but the Supreme Court never made any such holding* as a reading of its opinion will readily demonstrate.

The respondents had contended in the Trial Court and before the Supreme Court, and the Trial Court had held, that the entire contract was inexistent. Respondents maintained that they bought a herd of cattle and not 122 cows, that they bought one single thing and not 122 things; they maintained that the one thing which they bought (a herd of cattle) had tuberculosis and that therefore this one thing could not be the object of a sale under Section 1228 and that the contract was inexistent. They insisted that the Court had no right to inquire how many of the cows were diseased, that if a large part of the herd were diseased then the single thing which they bought was diseased. It was in disposing of this argument and for this purpose only that the Supreme Court used the expressions quoted in the majority opinion. The Supreme Court held that what the respondents bought was 122 cows, that some of them might be well and some of them sick, and that it did not follow that the entire herd was suffering from a contagious disease because some of the individual cattle were diseased.

The Supreme Court held that the respondents bought 122 individual cattle but they certainly never held, nor could they possibly have intended to hold, that the parties made 122 separate contracts, one covering each cow, which is the meaning attributed by the Circuit Court of Appeals to Judge WOLF's opinion.

Section 1394 of the Civil Code (see Appendix A) expressly provides that where several animals are sold for a lump sum, the contract may be rescinded as to those animals suffering from a defect *but not as to the*

other animals. The Code thus expressly provides for the partial rescission of a contract covering more than one animal and provides that in determining whether the animals sold were defective each animal must be considered separately. This is unquestionably what the Supreme Court had in mind as this is the result which that Court reached (see portion of Supreme Court's opinion italicized by the Circuit Court of Appeals in its opinion on page 59 of the transcript). This is not a decision that there was more than one contract, or that there was a separate contract covering each animal, as the Circuit Court of Appeals held, but a decision that the one single and only contract actually made may be partially rescinded.

The theory adopted by the Circuit Court of Appeals is not only contrary to the authorities but it is untenable as a matter of logic. One single contract may well be rescinded in part and stand in part but it cannot be both existent and inexistent at the same time any more than a man may be alive and dead at the same time. Here the parties either made a contract or they did not make a contract. They certainly never made two contracts or 122 contracts. If there was a licit object and a consideration for the contract the parties actually made, then that contract constituted a contract under Section 1228 (*supra*). The Circuit Court of Appeals found there was a licit object and consideration and that there was a contract. To hold that that contract may be so divided up that part of it is a contract and another part of it is not a contract is to read into Section 1228 a provision that a contract may be partially inexistent where there is a partial

lack of consideration. There is no such principle in the Spanish law, nor, so far as we know, in any English common law jurisdiction. Where a contract is divisible by its nature, suit may be brought to cancel it in part or to rescind it in part, but such a suit in itself recognizes the existence of the contract, while the theory followed by the Circuit Court of Appeals is that the contract is in existence and at the same time that it never was in existence.

Upon this point we would quote the sound reasoning of the dissenting opinion of Mr. Justice BINGHAM, who says (Tr. p. 66):

> "My associates apparently think that, although there was an existing contract of sale to which a warranty attached and on which warranty an action must be brought, if at all, within six months after delivery of the things sold, the plaintiffs nevertheless have six years within which to sue for money had and received, as if there were 122 distinct contracts of sale in each of which there was a fixed sum agreed upon and paid for each of the cows, diseased or sound, and that an action for money had and received can be maintained for the price of the diseased ones, although there was no distinct price agreed upon for each cow. It is perfectly apparent that an action for money had and received would not lie under the circumstances here disclosed and that it should not be held to lie in this case, for it would be substituting an action for money had and received for an action for damages, which the warranty provided for, and extending the period within which suit might be brought from six months to six years."

That a contract is not inexistent, or partially inexistent, because of a partial lack or failure of consideration is demonstrated by the following quotation from Manresa, one of the leading Spanish commentators:

> "There are three legal definitions of consideration: One for each group of contracts; onerous, remuneratory and gratuitous. Simple and clear as the legal text is, it has far reaching effects; it establishes a presumption that may provide a consideration for every contract and, in this sense, it supplements Article 1277, explaining generally and *a priori* the execution in principle of all licit contracts. Such presumption *renders very difficult the allegation of absence of consideration in contracts, such as contracts of sale or exchange,* which by imposing reciprocal obligations carry in themselves a sufficient consideration." (Italics ours.) Manresa's Commentaries, Vol. 8, page 678.

See also *Schluter* v. *Fernandez,* 30 P. R. R. 117, a suit for the purchase price of certain hams. While it appeared that some of the hams were rotten it also appeared that the purchaser had sold some of them which, therefore, had some value, and the Court allowed recovery of the entire contract price. Clearly if the contract were partially inexistent, or divisible, the Court could not have allowed recovery of the entire contract price.

At common law the rule, of course, is that any consideration is sufficient to support a contract and that a partial failure of consideration does not make the contract void or inexistent. (See 13 Corpus Juris 368 and cases there cited under note 2.)

We have found no case where a partial failure of consideration was held to make a contract void to the extent of such failure, nor any case holding that a single contract covering the sale of various different chattels for a lump sum could be divided up in such a way as to make void and inexistent part of the contract because of the partial failure of consideration. The practical impossibility of dividing the present contract is apparent from the allegation of the complaint that the 122 animals were sold for the lump sum of $18,000 and that they were "of different nature, race, gender, ages and color". The Court cannot remake the contract by supplying a price for each individual animal according to its "nature, race, gender and age" as the parties admittedly never contracted upon any such terms.

POINT III.

The Circuit Court of Appeals erred in granting to respondents permission to amend their complaint to state an action for money had and received covering the price of the diseased cattle:

(A) BECAUSE RESPONDENTS HAD AN ADEQUATE REMEDY UPON THE EXPRESS CONTRACT.

The Circuit Court of Appeals found that there was a contract between the parties because the sound cattle were sufficient consideration to support a contract. That contract necessarily contained the warranties provided by Sections 1389 *et seq.* of the Code (see

appendix), which warranties were a part of the express contract between the parties. Under Sections 1389, 1394 and 1402 respondents could have recovered the price or value of the diseased animals in a suit upon the express contract, but such suit prescribed six months after delivery of the cattle (Sections 1393, 1402) and had prescribed four months before this suit was brought. The Circuit Court of Appeals would permit the respondents now to amend their complaint to set up this same cause of action under the guise of an action for money had and received, an action upon an implied contract. The action contemplated by the Code sections for breach of warranty, permitting the vendee to recover the price or value of the diseased cattle, and the action for money had and received proposed by the Circuit Court of Appeals are to all intents and purposes identical, and as aptly stated by Circuit Judge BINGHAM in his dissenting opinion (Tr. p. 66) the effect of permitting the amendment is to extend the period within which the suit might be brought from six months to six years.

> "Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject matter; which is certainly sound law, unless the express contract has been rescinded or abandoned." *Hawkins* v. *United States,* 96 U. S. 698.

The civil law does not differ from the common law in this respect.

(B) BECAUSE THE AMENDMENT WOULD STATE AN ENTIRELY NEW AND DIFFERENT CAUSE OF ACTION FROM THAT STATED IN THE ORIGINAL COMPLAINT AND AS TO SUCH PROPOSED NEW CAUSE OF ACTION THE STATUTE HAS RUN.

The proposed amendment would state an entirely new cause of action. The complaint filed alleged that there was never any contract at all between the parties. The proposed amendment would proceed upon the theory that there were actually two contracts between the parties, and that one of them covering the sale of the tubercular cattle was inexistent, or that there was actually one contract, a part of which was existent and another part of which was inexistent at the same time. In either event the amended complaint would be directly contrary to the original allegation that there was no contract at all.

The cattle were sold and delivered on March 1, 1929. The judgment permitting the amendment was entered February 12, 1936, or almost seven years later. Even though the respondents had an action based upon the nullity of the contract, or part of the contract, that action prescribed four years after March 1, 1929.

Section 1268 of the Revised Civil Code provides:

> "Sec. 1268. The action for nullity shall last four years.
>
> "This term shall commence to run:
>
> "In cases of * * * error or deceit or falsity of consideration, from the date of the consummation of the contract."

Section 140 of the Puerto Rico Code of Civil Procedure covering the amendment of pleadings is exactly the same as Section 473 of the California Code of Procedure, the Puerto Rico Code being taken from the Idaho Code which in turn came largely from the California Code. In conformity with the prevailing view in Code states the courts of California have repeatedly held that a complaint may not be amended to state a new or different cause of action;

> *Union Lumber Co.* v. *Shouter Co.,* 25 Cal. App. 80; 142 Pac. 910;
> *Altpeter* v. *Postal Tel. Cable Co.,* 26 Cal. App. 705; 148 Pac. 241;

especially where the Statute of Limitations had run against such new cause of action;

> *Peiser* v. *Griffin,* 125 Cal. 9;

and that if the amendment states a new cause of action the amendment does not relate back to the beginning of the action so as to stop the running of the statute.

> *Hunt* v. *Glassell,* 30 Cal. App. 676; 159 Pac. 227.

The situation in the present case is much like that disclosed by the opinion in *Warner* v. *Godfrey,* 186 U. S. 365, in which this Honorable Court reversed a judgment of the Court of Appeals of the District of Columbia which had permitted an amendment under similar circumstances.

POINT IV.

The decision of the Supreme Court of Puerto Rico upon matters relating wholly to the construction and application of local statutes, especially statutes of Spanish origin, will not be disturbed when such construction and application are not clearly wrong.

Diaz v. *Gonzalez,* 261 U. S. 102.

POINT V.

The result reached by the Circuit Court of Appeals is not a just result.

Perhaps the compelling reason in the minds of the majority of the court for the result they reached in this case is that set out in the final words of the opinion (Tr. p. 59):

"At any rate it is the just result"

and this expression would seem to indicate that the court itself entertained considerable doubt as to the soundness of its reasoning.

We submit that the result reached is not the just result unless we are to take the view that all Statutes of Limitation are in themselves unjust.

Respondents had their choice of two perfectly adequate remedies. They could have sued for rescission within forty days after delivery of the cattle or for damages for breach of warranty within six months.

Three of the cattle died eighteen days after delivery and six more within the next ten days, yet apparently the respondents made no effort to determine the cause of these deaths as the tuberculosis was discovered by accident by a veterinarian only in July (Tr. p. 20). Even on that date when respondents had definite knowledge of the presence of tuberculosis in the cattle, they still had ample time to sue for breach of warranty but they waited until December before bringing suit. It cannot be said that the statute worked any hardship on them. As the Supreme Court says, to permit the vendee to wait two or three or four years before filing suit would be unjust to the vendor, who in this case it is admitted acted in perfect good faith. The Trial Court did not presume to find how many of the cattle had tuberculosis when they were sold. Who can say that those cattle which died in November and December already had tuberculosis when delivered on March 1st? It may well be that prompt action by the respondents to determine the cause of the first deaths would have prevented the spread of the disease and saved many of the cattle which later died. The short statute is only a fair and reasonable protection to the vendor and the requirement of prompt action on the part of the vendee is not an undue hardship. Furthermore, as the Supreme Court aptly says:

> "The idea of the Spanish Legislature, and it is our own, was *Interest Republicae ut sit finis litium.*"

CONCLUSION.

It is respectfully submitted that these most important questions of Spanish law and of general law have been erroneously decided by the Circuit Court of Appeals and that the decision of the Circuit Court of Appeals should be reviewed by certiorari and reversed.

Respectfully submitted,

JOSE MATOS,
By GABRIEL I. LEWIS,
His Attorney.

OSCAR B. FRAZER,
Of Counsel for Petitioner.

APPENDIX "A".

Revised Civil Code of Puerto Rico.

Book Fourth,—Title IV,—Chapter IV,—
Article Third:—

§ 2.

"Warranty against hidden defects of or burdens on the thing sold.

Sec. 1387. The vendor is bound to give a warranty against hidden defects which the thing sold may have should they render it unfit for the use to which it was destined, or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and who by reason of his trade or profession should easily perceive them.

Sec. 1388. The vendor is liable to the vendee for the warranty against faults or hidden defects in the things sold, even when they should be unknown to him.

This provision shall not obtain if the contrary should have been stipulated and the vendor should not have been aware of said faults or hidden defects.

Sec. 1389. In the cases of the two preceding sections the vendee may choose between withdrawing from the contract, the expenses which he may have incurred being returned to him, or demanding a proportional

reduction of the price, according to the judgment of experts.

If the vendor knew of the faults or hidden defects in the thing sold and did not give notice thereof to the vendee, the latter shall have the same option, and furthermore, be indemnified for the losses and damages should he choose the rescission.

Sec. 1390. If the thing sold should be lost on account of hidden faults and the vendor was aware of them, he shall bear the loss, and return the price and pay the expenses of the contract, with losses and damages. If he was not aware thereof, he shall only return the price and pay the expenses of the contract which the vendee may have paid.

Sec. 1391. If the thing sold had any hidden fault at the time of the sale, and should be lost afterwards by a fortuitous event or by fault of the vendee, the latter may demand of the vendor the price he paid, deducting the value the thing had when lost.

If the vendor acted in bad faith, he must pay losses and damages to the vendee.

Sec. 1392. There shall be no liability for losses and damages in judicial sales, but all the other provisions of the preceding section shall be applied.

Sec. 1393. Actions arising from the provisions of the five preceding sections shall be extinguished after six months, counted from the delivery of the thing sold.

Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special

price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.

This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same.

Sec. 1395. The provisions of the preceding section, with regard to the sale of animals, is understood as applicable also to the sale of other things.

Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, except in the case prescribed in the following section.

Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.

Sec. 1398. If the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable for losses and damages.

Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

Sec. 1400. If the animal should die within three days after being bought the vendor shall be liable, provided the disease that caused the death, in the judgment of veterinarians, existed before the contract.

Sec. 1401. If the sale has been rescinded the animal must be returned in the condition in which it was sold and delivered, the vendee being liable for any injury due to his negligence and which does not arise from the redhibitory vice or defect.

Sec. 1402. In the sale of animals and cattle with redhibitory vices the vendee shall enjoy the privilege mentioned in Section 1389; but he must make use thereof within the same period which has been respectively fixed for the exercise of the redhibitory action."